IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 171.

LAFAYETTE B. EATON, APPELLANT AND PLAINTIFF IN ERROR,

vs.

HARRISON H. BROWN AND IRA DORRANCE, APPELLEES.

APPELLEES' BRIEF.

Error and appeal from a decree of the Court of Appeals of the District of Columbia refusing probate and record to a paper writing propounded by appellant as the last will and testament of one Caroline Holley, deceased.

Facts.

On December 23, 1901, appellant filed with the Register of Wills of the District of Columbia a certain paper writing purporting to be the last will and testament of one Caroline Holley. This instrument in full is as follows:

"WASHINGTON, D. C., *Aug. 31, 1901.*

"I am going on a journey and may, not ever return. And if I do not, this is my last request. The

mortgage on the King House, which is in the possession of Mr. H. H. Brown to go to the Methodist Church at Bloomingburgh. All the rest of my property both real and personal to my adopted son L. B. Eaton of the Life Saving Service, Treasury Department, Washington, D. C. All I have is my one hard earnings and I propose to leave it to whome I please.

"CAROLINE HOLLEY."

On February 10, 1902, he filed an amended petition in the Supreme Court of the District of Columbia, then holding a special term for Orphans' Court business, praying for the admission to probate of the aforesaid writing and for letters of administration *cum testamento annexo* (Transcript of Record, pp. 1–3).

On February 4, 1902, the appellee, Ira Dorrance, had filed a *caveat* stating his grounds of objection to the said will (Trans. pp. 4 and 5). Subsequently the appellee, H. H. Brown, filed his answer to the petition.

The cause came on for hearing on April 25, 1902, and the only facts proved, or attempted to be proved, were those contained in the stipulation of the parties at page 7, being as follows:

"1. That the paper writing filed as said will is in the handwriting of the deceased, and that it was signed by her on the 31st day of August, 1901.

"2. On the first day of September she took a journey to the Buffalo Exposition, through Canada, back through the Adirondacks, and then to Washington, D. C., where she resumed her occupation as clerk in the Treasury Department, and died December 17, 1901, at Washington, D. C."

On May 21, 1902, judgment was entered refusing the probate and dismissing the petition. From this decree appellant appealed to the Court of Appeals of the District of Columbia (Trans. p. 7). This appeal was argued on October

14, 1902, and on November 4, 1902, the decree of the Supreme Court was affirmed, Mr. Justice Morris writing the opinion, which is found at pages 9–15 of the transcript.

The facts that can be used in argument on this appeal are limited to those above recited, no others appearing in the record.

The principal assignment of error involves the question whether the words used in the will formulated a condition, and the only condition, under which the writing could become valid and effectual as a testamentary disposition.

POINT I.

It Appears Plainly That Testatrix Intended the Disposition of Her Property to Become Effectual Only in Case of the Happening of the Contingency Specified in the Will.

Parsons *vs.* Lanoe, 1 Ves. Sr. 190, and Ambler, 557.
Sinclair *vs.* None, 6 Ves. Jr. 607.
Estate of Winn, 2 Sw. & Tr. 47.
Roberts *vs.* Roberts, 8 Jur. N. S. 220.
Matter of Porter, L. R. 2 P. & D. 22.
In re Robinson, L. R. 2 P. & D. 171.
Lindsay *vs.* Lindsay, L. R. 2 P. & D. 449.
In re Ward, 4 Hagg. 179.
In re Todd, 2 W. & S. (Pa.) 145.
Morrow's Appeal, 116 Pa. 440.
Wagner *vs.* McDonald, 2 Har. & J. 346.
Maxwell *vs.* Maxwell, 3 Met. (Ky.) 101.
Daugherty *vs.* Daugherty, 4 Met. (Ky.) 25.
Robnett *vs.* Ashlock, 49 Mo. 171.
McGee *vs.* McNeill, 41 Miss. 17.

The language used by the respective testators in the cases above cited is strikingly similar to that used by testatrix in the case under consideration.

In Parsons *vs.* Lanoe, the leading case upon the subject, the words used are:

> "In case I should die before I return from the journey I intend, God willing, shortly to undertake for Ireland."

We call the attention of the court particularly to the language construed in the following cases to render the will contingent:

> "If I never get back home I leave you everything in the world."
>
> Maxwell *vs.* Maxwell.

> "On anything happening that I should not return alive."
>
> Daugherty *vs.* Daugherty.

> "Should I never return I also desire."
>
> Massey *vs.* Griffin.

The foregoing three being Kentucky cases.

> "I this day start for Kentucky and may never get back. If it should be my misfortune I give my property," etc.
>
> Robnett *vs.* Ashlock (Mo.).

> "I am going to town with my drill and in case I should not get back do as I say on this paper."
>
> Morrow's Appeal (Pa.).

> "If I never get back to you I want all I have to be yours."
>
> McGee *vs.* McNeill (Miss.).

The object, in all cases in which the construction of a will is in question, is to arrive at the intent of the testator as therein expressed. In construing this will the only ques-

tion is, was the language importing the contingency intended by the testatrix to control the testamentary disposition, or was it used by her merely as a statement of circumstances existing at the time, which induced her to execute the will.

Subsequently we present a brief analysis of the authorities submitted by appellant and show that the language used by the testator in each case was plainly either susceptible of two constructions, or clearly showed that the testator was merely describing the circumstances influencing him to execute the will at that particular time (see Point II, *infra*).

We have yet to discover a case in which terms absolutely stating a contingency have been interpreted in any way except according to the plain meaning of the words used.

Judge Earl, of the Court of Appeals of New York, in the case of Ketaltas *vs.* Ketaltas, 72 N. Y. 312, expresses the rule for construction in probably as concise language as it is stated anywhere:

> "The primary object in construing wills is to ascertain the intention of the testator, and when that has been ascertained it is to be implicitly obeyed, however informal the language in which such intention has been conveyed. *But the intention is not matter of speculation or arbitrary conjecture. It is sought for in the language used;* and when language or a certain collocation of words has once received judicial construction precedents are formed which are followed in later cases. It is a general rule of construction that when a testator uses technical words he is presumed to employ them in their legal sense, and that *words in general are to be taken in their ordinary and grammatical sense, unless the context clearly indicates the contrary.*"

Applying that rule of construction to the present case, if the language used is not intended to describe a contingency which must have happened to make the will effectual, what other or stronger terms could the testatrix have used in order to express such testamentary intent. As Mr. Justice Morris says in the opinion :

> "If the words used in it as a preamble do not constitute a condition upon which the document is to become effective, we find it impossible to say what words could have been used for the purpose. . . . *Language could not well be plainer than this.*"

The words used in this case having an obvious and well-recognized meaning, and there being nothing in the context to imply that the testatrix intended to use the words with any but the ordinary force, the will becomes amenable to the following well-established rule of construction:

> "Words and limitations may be transposed, supplied or rejected where warranted by the immediate context, or the general scheme of the will; *but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument.*"
>
> 3 Jarman on Wills, 708, Rule XIX.

POINT II.

The Cases Cited by Appellant are Inapplicable to the Case at Bar.

In Bradford *vs.* Bradford, 4 Ky. L. R. 947, the language used was:

> "Being . . . about to start upon a long journey . . . I deem it prudent to provide for the disposition of my property in case I should not return."

In Cody *vs.* Conley, 27 Gratt. 313:

> "I am going away. I may never return. I leave my property," etc.

In In re Thorne, 4 Sw. & Tr. 36:

> "I request in the event of my death while serving in this horrid climate or any sudden happening to me, I leave and bequeath to my beloved wife,"

etc. . . . "I consider that every person should be prepared for the worst and particularly in such a treacherous climate as this."

In Ex parte Lindsay, 2 Bradford, N. Y. 204:

"According to my present intention should anything happen to me before I reach my friends in St. Louis, I wish to make a correct disposition," etc.

It appears on the face of all of the above cases that the recital of facts is merely intended by the testator to describe the motive which he had at the time for the execution of the will. Possibly the case most in appellant's favor is Ex parte Lindsay. But the words used in that case plainly import:

"I wish to make a correct disposition of my property in case anything should happen to me before I reach my friends in St. Louis."

Appellant also cites the following cases:

"Likefield *vs.* Likefield (82 Ky. 589): If any accident should happen to me that I die from home my wife Julia Ann Likefield shall have everything I possess."

"French *vs.* French (14 W. Va. 459): Let all men know hereby if I get drowned this morning . . . that I bequeath all my property personal and real to my beloved wife."

"In re Dobson (1 P. & D. 88): In case of any fatal accident happening to me being about to travel by railway I hereby leave all of my property to," etc.

"Skipworth *vs.* Cabell (19 Gratt. 75–78): In case of a sudden and unexpected death I give the remainder of my property," etc.

These cases are not at all similar to the case at bar. They can be clearly distinguished by the fact that in each the instrument is clearly made as a final testamentary disposition. As Mr. Justice Morris says in his opinion:

> "The cases of Likefield *vs.* Likefield and French *vs.* French were cases in which the wills were made by husbands in favor of their wives, and the disposition which they would probably have made of their respective estates in any event; and it is evident in both cases that the testator contemplated the propriety of making wills in view of the possible nearness of death, and did not intend the testamentary disposition to be specifically contingent upon the issue of the journeys upon which they were at the time about to enter."

In the present case, as Mr. Justice Morris very aptly remarks, there is no reference, specific or otherwise, to the death of the testatrix, and there is nothing in the terms of the will to support or furnish ground for a belief that the testatrix intended the will as anything more than a disposition of her property to take effect only in case she did not return from the journey she anticipated taking, and that she may have intended, in case she did return, to make some other disposition of her estate. As a matter of fact, she may after her return have made some different disposition. It is certain that no evidence was introduced showing in any way a republication of the will, nor from which an intent to republish can be presumed.

We respectfully submit that the construction of this will desired by appellant would not only be against the weight of previous decisions in parallel cases in this country and in England, but would do violence to the plain intention of the testatrix expressed in unequivocal language; and would practically have the effect as a precedent of making the execution of a contingent will an impossibility.

POINT III.

The Court of Appeals Ruled Correctly as to the Second Assignment of Error Therein.

We fail to see how the appellant came to introduce this question into the previous appeal, as no testimony was

offered in support of the allegations of the petition, and there was nothing before the court except the facts embraced in the stipulation in the case. There being nothing in the record to show that the question was raised in the court below or decided by it, there is nothing upon which to predicate an assignment of error.

POINT IV.

The Matter of Costs Was Properly Disposed Of.

The third assignment of error to the Court of Appeals was based upon the adjudication of costs, and the reasons cited in the opinion of Mr. Justice Morris, at page 15 of the record, were sufficient to warrant the disposition of the matter made by that court.

POINT V.

The Decree Appealed From Should be Affirmed, and the Writ of Error Dismissed With Costs to the Appellees.

THOMAS WATTS,
Attorney for Appellees.